Supreme Court, U.S.
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No. 95-1574

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ALTON & SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

JEROLD EDWARDS,
Respondent.

On Petition for a Writ of Certiorari to the
Appellate Court of Illinois, Fifth District

REPLY BRIEF

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ARGUMENT

II. THIS CASE PRESENTS A TIMELY AND UNIQUE OPPORTUNITY FOR THE COURT TO REASSERT ITS COMMAND THAT THE STATUTORY RIGHT TO TRIAL BY JURY IN FELA CASES BE PRESERVED, AS CONGRESS INTENDED.

Edwards lists three cases decided by the Fifth District of the Illinois Appellate Court which he suggests balance out the list of cases A&S supplied with respect to that Court's recent disregard of the statutory right to jury trial in FELA cases. One of Edwards' cases, *Lewis v. Norfolk & Western Ry. Co.*, 269 Ill.App.3d 483, 646 N.E.2d 1378 (5th Dist. 1995), does not support Edwards' position. In *Lewis*, the Appellate Court answered certified questions of *law*. No jury trial was in issue. The other two cases Edwards relies on were decided in 1990 and 1991. Since then, the makeup of the Fifth District has changed significantly. The list of cases A&S supplied show the recent trend of the Fifth District in their disrespect of this Court's decisions and Congress' intent in vesting the power of decision in the jury in FELA cases. Unless stopped now, that trend will continue.

A. The Illinois Appellate Court Improperly Prevented a Jury Decision on the Applicability of the Boiler Inspection Act.

Edwards states the applicability of the Boiler Inspection Act is a question of law for the court, and therefore, the trial court did not invade the province of the jury in deciding that issue. However, there were no issues of fact for the jury to resolve in the cases Edwards cites in support of his statement. *See, Angell v. Chesapeake & Ohio Ry. Co.*, 618 F.2d 260 (4th Cir. 1980) ("[S]ince the facts surrounding this issue were not in dispute, the application of the Act was a matter of law to be decided by the . . . court.")

Whereas, in this case, factual issues did exist as to whether the engine was in use at the time of Edwards' alleged accident. Where factual determinations are to be made in resolving the "in use" issue, those factual determinations must by made by the jury.

Edwards asserts the evidence that the track was not "blue flagged" is evidence that the track was in use because it reveals no repairs to the locomotives were necessary. However, a locomotive does not have to be undergoing repairs to be out of use. Locomotives being serviced or inspected on a track devoted to such activities are out of use as well. If the jury determined Edwards' injury occurred while he was inspecting the locomotive, as the times listed on his inspection and accident reports indicate, then the locomotives were out of use, and the BIA was inapplicable.

B. The Illinois Appellate Court Improperly Prevented a Jury Decision on the Violation of the Boiler Inspection Act.

Edwards argues A&S's documentation and reports of the incident confirmed Edwards' testimony that he was injured moving a stuck drawbar. Edwards neglects to mention that his alleged accident was unwitnessed. (R515, 610) The accident was not reported to A&S until two hours after it allegedly occurred. (R521, 522) A&S's reports concerning the incident were based on what Edwards said happened. It is ludicrous to assert that because A&S documented Edwards' claim that the drawbar was stuck, A&S cannot dispute that the drawbar was stuck.

Edwards implies A&S made some type of an admission when its locomotive engineer acknowledged that drawbars can stick because of lack of grease and cause injury. However, there was no evidence the subject drawbar lacked grease, nor any evidence of a metal defect which could have caused the drawbar to stick.

As set forth in A&S's petition, whether the drawbar stuck at all was a question for the jury.

When attempting to minimize the significance of his trial testimony of the time of the accident, Edwards omits the fact that his own accident report made on the day of the accident also lists the time of the accident as 11:00 a.m. A report made at the time of the occurrence has more credibility than testimony given years later.

Edwards acknowledges the inconsistency between the reports he prepared on the day of the accident, e.g., the accident report and the inspection report, and his trial testimony concerning the sequence of events that day. In trying to resolve this inconsistency, Edwards asserts he made a mere error in estimating the time of his alleged accident. Whether the time Edwards listed in his accident report was an error or whether he was lying about what he was doing at the time of his alleged injury was not subject to only one reasonable conclusion. Resolution of that conflict was for the jury, not the courts.

C. The Illinois Appellate Court Improperly Prevented a Jury Decision on Causation Between the Alleged Violation of the Boiler Inspection Act and Edwards' Injuries.

Edwards agrees that the jury, and not the courts, should have decided the question of causation. He urges the trial court did not direct a verdict on causation, and the appellate court did not rule that it had.

On the contrary, Edwards misstates the record on this issue. During the instruction conference, A&S tendered instruction #9 which stated:

> " The plaintiff claims that he was injured and sustained damages while he was pushing a drawbar in the course of his employment with the railroad.

The railroad denies that the alleged injuries and damages resulted, in whole or in part, from the plaintiff pushing a drawbar.

The railroad further denies that the plaintiff was injured or sustained damages *to the extent claimed.*." (R895) (Emphasis added)

The trail court refused this instruction because of the *second* paragraph. Edwards' counsel argued the second paragraph was inconsistent with the court's ruling that A&S was found liable. (R893) The court ruled the only issue for the jury to decide was the nature and extent of plaintiff's damages, "*not* whether they happened pushing the drawbar or not." (R891-892) It is the third paragraph of the instruction which tells the jury to determine the extent of Edwards' damages. It is the second paragraph, which the court refused, which would have instructed the jury to determine whether Edwards' alleged injuries and damages were caused by pushing a drawbar. As a result of the court's rulings on causation, A&S was required to retender the instruction deleting the second paragraph. (R895-896)

The portions of the record Edwards cites at page 773 through 776 came before the trial judge made his formal ruling that he was finding "cause in fact as a matter of law." (R892)

The Illinois Appellate Court affirmed the directed verdict on causation: "[W]e believe the plaintiff showed a causative relationship between the defect and his injury. We note that we have previously addressed the defendant's contentions on causation . . ." (A-21,22)

However, the appellate court did not agree that the trial court directed a verdict that Edwards sustained damages. (A-22) This is the portion of the appellate court's opinion that Edwards addresses. Because of the appellate court's disagreement, in this Court, A&S did not raise the issue of whether the trial court erred

in directing a verdict that Edwards sustained damages. Instead, it limited the assignment of errors to the directed verdicts on the applicability of the BIA, the violation of the BIA and causation.

CONCLUSION

For the reasons stated herein and in the petition for writ of certiorari, certiorari should be granted.

Respectfully submitted,

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